

No. 48661-0-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BYRON FAMOUS JACKSON,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. ISSUES.....	1
II. STATEMENT OF THE CASE	1
III. ARGUMENT	8
A. THE TRIAL COURT ERRONEOUSLY USED THE MANIFEST INJUSTICE STANDARD WHEN IT DENIED JACKSON'S CrR 7.8 MOTION, THE COURT SHOULD REMAND JACKSON'S CASE SOLELY FOR CONSIDERATION OF LEGAL STANDARDS OF CrR 7.8(b)	8
1. Standard Of Review	9
2. The Trial Court's Findings Are Supported By Substantial Evidence	10
3. The Trial Court Abused Its Discretion When It Denied Jackson's CrR 7.8 Motion Using A Manifest Injustice Legal Standard	11
B. JACKSON RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE PROCEEDINGS	18
1. Standard Of Review	18
2. Jackson's Attorney For His CrR 7.8 Hearing Was Not Ineffective For Failing To Adequately Prepare and Evaluate Jackson's California Convictions	19

C.	THE TRIAL COURT INQUIRY OF JACKSON REGARDING HIS ABILITY TO PAY WAS SATISFACTORY PRIOR TO ITS IMPOSITION OF NON-MANDATORY LEGAL FINANCIAL OBLIGATIONS.....	23
D.	JACKSON'S ISSUE REGARDING APPELLATE COSTS IS MOOT WITH THE COURT'S AMENDMENT OF RAP 14.2.....	26
IV.	CONCLUSION.....	27

TABLE OF AUTHORITIES

Washington Cases

<i>In re Lavery</i> , 154 Wn.2d 249, 111 P.3d 837 (2005)	22
<i>State ex. rel. Lige v. County of Pierce</i> , 65 Wn. App. 614, 829 P.2d 217 (1992), review denied 120 Wn.2d 1008 (1992)	9
<i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956 (2010)	10
<i>State v. Blanks</i> , 139 Wn. App. 543, 161 P.3d 455, 457 (2007)	9
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015)	23, 24
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006)	9
<i>State v. Duncan</i> , 185 Wn.2d 430, 374 P.3d 83 (2016)	23
<i>State v. Gomez-Florencio</i> , 88 Wn. App. 254, 945 P.2d 228 (1997)	9
<i>State v. Horton</i> , 116 Wn. App. 909, 68 P.3d 1145 (2003)	20
<i>State v. Lamb</i> , 175 Wn.2d 121, 285 P.3d 27 (2012)	16, 17
<i>State v. Larranaga</i> , 126 Wn. App. 505, 108 P.3d 833 (2005)	16
<i>State v. Lohr</i> , 164 Wn. App. 414, 263 P.3d 1287 (2011)	9
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995)	19
<i>State v. Padilla</i> , 84 Wn. App. 523, 928 P.2d 1141, review denied, 132 Wn.2d 1002 (1997)	9
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	19
<i>State v Zhao</i> , 157 Wn.2d 188, 137 P.3d 835 (2006)	16

Federal Cases

North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970)4

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984)19, 20

Washington Statutes

RCW 9.94A.360(3)14

RCW 9A.52.025.....22

RCW 10.01.160(3).....23

Other Rules or Authorities

CrR 4.2(f)11, 16

CrR 7.8 5, 7, 8, 9, 11, 12, 15, 16, 17, 18, 19, 20, 22, 27

RAP 14.226, 27

I. ISSUES

- A. Did the trial court abuse its discretion when it denied Jackson's CrR 7.8 motion?
- B. Did Jackson receive effective assistance from his counsel throughout the proceedings?
- C. Did the trial court not conduct the required inquiry regarding Jackson's ability to pay before imposing discretionary legal financial obligations?
- D. The amendment to RAP 14.2 renders the State's ability to request appellate costs impossible on an indigent appellant.

II. STATEMENT OF THE CASE

Byron Jackson was charged in Lewis County Superior Court on May 19, 2014 with Counts I and II: Assault in the Second Degree, Counts III and VI: Residential Burglary, Counts IV and V: Harassment Threat to Kill. CP 1-4. Counts I and II carried deadly weapons enhancements. *Id.* The charges stemmed from an incident that occurred on May 17, 2014 at approximately 4:13 a.m. in Centralia, Washington. CP 7.

Centralia police officers were dispatched to an ongoing dispute. CP 7. Dispatch could hear lots of screaming and believed a baseball bat was involved. *Id.* Sgt. Denham arrived on the scene first and could hear yelling from inside the residence. CP 7-8. Sgt. Denham waited for backup. CP 8. While waiting for backup, Sgt. Denham heard a man yelling, demanding to know where "she" was.

Id. A woman said she did not know. *Id.* The man said, “I warned you that if she wasn’t here by the time the sun came up I was going to fucking kill you.” *Id.* Sgt. Denham could hear a man and a woman telling the other man they did not know where “she” was. *Id.* Again, the man threatened to kill the occupants with a baseball bat. *Id.* Sgt. Denham then heard the woman “begin to scream and sounds that indicated a scuffle had started inside the apartment.” *Id.*

The police kicked in the door to the apartment and Jackson, and another man, Sean Phippen, were standing near the door. *Id.* Jackson was holding a baseball bat. *Id.* The incident was in regards to Jackson’s missing girlfriend. CP 8-9. Jackson had threatened to kill the resident of the apartment, Michael Lilly, and a friend, Amber Anderson. *Id.* Jackson had actually tried to hit Ms. Anderson with the bat but Mr. Lilly had been able to protect her. CP 8. Mr. Lilly and Ms. Anderson were fearful they would have been seriously assaulted had police not kicked in the door and apprehended Jackson and Mr. Phippen. CP 9.

The State amended the charges on July 17, 2014 to Counts I and II: Assault in the Second Degree, Count III: Burglary in the First Degree, Counts IV and V: Harassment – Threat to Kill, Counts VI and

VII: Unlawful Imprisonment. CP 18-24. Counts I and II still contained the deadly weapon enhancement. *Id.*

On July 18, 2014 the State filed a Second Amended Information pursuant to a plea agreement with Jackson. RP (7/8/14) 2¹; CP 25-27. Pursuant to the plea agreement, Jackson pleaded guilty to Count I: Residential Burglary, Counts II and III; Assault in the Second Degree, and Count IV: Unlawful Imprisonment. RP (7/8/14) 3, 11; CP 25-36. Prior to entering the plea of guilty the deputy prosecutor informed the trial court,

I do want to inform the Court that Mr. Jackson has quite a bit of criminal history out of the state of California. I think we have everything we need with regard to his criminal history. I think Mr. Blair and I agree that no matter how it shakes out, given what he's pleading to today, he will have a score of at least 9 to all of the counts, and if he ends up having more than that or more than the State believes he currently has, it won't make a difference in the State's recommendation. However, if he has a fewer number and it drops down, the State's recommendation will be high end within whatever his range happens to be. But at this point in time, as we sit, it appears he has at least nine, if not more.

RP (7/8/14) 2. Mr. Blair replied,

We'll agree with what Mr. Halstead just said. Unfortunately, he has -- as a very young man he has a

¹ There are a number of different verbatim report of proceedings (eight). The State will refer to the verbatim report of proceedings which contains the CrR 7.8 motion hearing and three other hearings as MRP. The remaining VRPs will be referred to as RP and the date of the proceeding.

number of burglary convictions out of California, and as the Court knows, burglaries are multipliers. So the 63 to 84, I think everybody will agree, that is clearly the highest standard range. So we're ready to proceed. It is in the form of an Alford plea -- and I can explain that at the appropriate time -- to all four counts.

Id. at 2-3.

After going through the plea, Jackson pleading guilty pursuant to an *Alford*² plea. *Id.* at 7-11. The trial court then discussed Jackson's criminal history with him. *Id.* at 11-12. The trial court stated,

And with respect to your criminal history, as I understand it, the prosecutor's in the process of verifying that. The prosecutor's calculations now give you an offender score of nine plus as to all four matters. 63 to 84 standard range on Count 1, 63 to 84 on Counts 2 and 3, and 51 to 60 on Count 4. And the recommendation that the State's going to be making is top of the range, which is 84, and if the criminal history comes back as less than that, then the State's still going to recommend top end of the range regardless of what it is. Do you understand that?

Id. Jackson replied, "Yes." *Id.* at 12. Jackson signed the Statement of Defendant on Plea of Guilty (SDPG). CP 36. Ultimately, Jackson was sentenced to standard range sentence of 70 months. RP (7/18/14) 27; CP 43. Jackson also signed a Stipulation on Prior

² *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed.2d 162 (1970).

Record and Offender Score. CP 37-38. The judgment and sentence was formally entered on July 24, 2014. CP 39.

On July 27, 2015 a CrR 7.8 Motion for Relief from Judgment and Order. CP 57-81. The motion was signed July 4, 2015. CP 81. Jackson also filed a motion to terminate his legal financial obligations. CP 127-29. Jackson alleged his offender score was miscalculated due to his out of state convictions being improperly counted. CP 59-63. Jackson also alleged ineffective assistance of counsel, the State over-charged him, his plea was involuntary, and that the elements of a dwelling were not met. CP 64-81. The trial court appointed Jackson new counsel due to Jackson's allegations of ineffective assistance of counsel of his prior attorney. MRP 6-7.

On January 15, 2016 a hearing was held on Jackson's CrR 7.8 motion. MRP 10. Jackson decided to proceed only on his motions to terminate his legal financial obligations and his incorrect offender score (and any claim of ineffective assistance of counsel that would be integrated within that claim). MRP 10-13. Jackson testified at the hearing as did his prior counsel, Mr. Blair. See MRP.

Jackson testified he told Mr. Blair he had some burglaries in the past but they were so long ago Jackson could not remember the specifics. MRP 17. Jackson said he told Mr. Blair prior to being

sentenced some of the charges should be same criminal conduct. MRP 18-19. According to Jackson, Mr. Blair told him that was not how it worked in Washington. *Id.* Jackson said “Any time that he [,Mr. Blair,] came to visit me was, you know, for maybe five minutes, if anything.” MRP 21. Jackson said there was never a chance to go over his criminal history. MRP 21.

Jackson also disputed that he was ever convicted of the four 1996 Residential Burglaries that appear on the Stipulation of Prior Record and Offender Score and his Judgment and Sentence. MRP 23, 25-26, 31-32, 38, 43-44; CP 37-50. When asked by the deputy prosecuting attorney if he was convicted of four counts of Residential Burglary in 1996, Jackson responded, in contradiction to his earlier testimony, “I don’t recall this ever happening.” MRP 38.

Mr. Blair contradicted Jackson’s testimony that he was never convicted of the 1996 burglaries. MRP 56, 68-69. Jackson had told Mr. Blair it had been separate residence he had burglarized back in 1996 but it was part of a “crime spree” therefore it should be counted as same criminal conduct. MRP 68-69. When asked if it did not concern Mr. Blair that the dates of the crimes were missing from the judgment and sentence in regards to 1996 residential burglaries, Mr. Blair replied, “No, because there was never a question between Mr.

Jackson and myself that he had been convicted of all of these crimes...I agree there is a question today. Back in 2014 there was not a question.” MRP 67-68.

In regards to the legal financial obligations, the trial court read a portion of Jackson’s statement from his sentencing hearing, in which Jackson discussed being a tattoo artist. MRP 90. Jackson was looking for a construction job at the time of the crimes. *Id.* Jackson discussed how he diligently looked for work. *Id.* The trial court determined Jackson was able to work and had the means to make payments on legal financial obligations. *Id.*

The trial court also denied Jackson’s CrR 7.8, finding there was no manifest injustice. MRP 100. The trial court found Mr. Blair was not ineffective. *Id.* 100-01. The trial court also found Jackson “knew what was going on.” MRP 104. Trial court found Jackson knew his criminal history. MRP 105. Jackson timely appeals the trial court’s denial of his motions. CP 319-22.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE TRIAL COURT ERRONEOUSLY USED THE MANIFEST INJUSTICE STANDARD WHEN IT DENIED JACKSON'S CrR 7.8 MOTION, THE COURT SHOULD REMAND JACKSON'S CASE SOLELY FOR CONSIDERATION OF LEGAL STANDARDS OF CrR 7.8(b).

Jackson asks the Court to reverse and remand his case for resentencing, stating his prior convictions were not proven to be legally or factually comparable to Washington State offenses. Brief of Appellant 4-27. Jackson ignores in his briefing to the Court what he is appealing is the determination of his CrR 7.8 motion, not the underlying sentence and determination of the offender score from the original sentencing hearing. Jackson filed a CrR 7.8 motion arguing his offender score was inaccurate based upon his out of state convictions being improperly counted towards his offender score. The trial court abused its discretion by applying the wrong legal standard when it denied Jackson's CrR 7.8 motion. The Court should remand the case back to the trial court for consideration under the correct legal standards found in CrR 7.8(b).³

³ The State is not conceding that Jackson's out of state convictions were not legally or factually comparable. The State's position is that this issue is not properly before this Court, and the only question is whether the trial court abused its discretion.

1. Standard Of Review.

A trial court's determination of a CrR 7.8(b) motion is reviewed for abuse of discretion, and the findings of fact that support this decision are reviewable for substantial evidence. *State v. Blanks*, 139 Wn. App. 543, 548, 161 P.3d 455, 457 (2007); *citing State v. Padilla*, 84 Wn. App. 523, 525, 928 P.2d 1141, *review denied*, 132 Wn.2d 1002 (1997), *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006); *State v. Gomez-Florencio*, 88 Wn. App. 254, 258, 945 P.2d 228 (1997).

Substantial evidence exists when the evidence is sufficient to persuade a rational, fair-minded person of the truth of the finding based upon the evidence in the record. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011) (citation omitted). The appellate court defers to the fact finder regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. *State ex. rel. Lige v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992), *review denied* 120 Wn.2d 1008 (1992).

Assignments of error unsupported by argument or reference to the record will not be considered on appeal. *Lohr*, 164 Wn. App. at 419. Findings not assigned error become verities on appeal. *Id.* at 418.

A trial court's determination that a defendant received effective representation from his or her attorney is a mixed question of fact and law and is reviewed de novo. *State. v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010).

2. The Trial Court's Findings Are Supported By Substantial Evidence.

Jackson's assignments of error are confusing to the State, as they do not read as assignments of error traditionally do. Brief of Appellant 1-2. The "assignments of error" read more like "issues presented" to the State. This is further supported by the missing "issues presented" section and the fact that none of the trial court's findings of fact or conclusions of law are assigned error, which, when reading the arguments in the briefing or even the "assignments of error" is clearly not intentional. Jackson bears the burden to show there is not sufficient evidence to persuade a reasonable person of the trial court's findings. *A.N.J.*, 168 Wn.2d at 107 (internal citations omitted).

The State is unsure how to address the findings. Is it supposed to pick through all the entirety of the briefing to figure out exactly which findings Jackson is challenging?⁴ Is the State to look

⁴ The State has, in previous briefings when it is clear which findings are being challenged, done this.

at the “assignment of error” section and attempt to ascertain from it which findings it appears Jackson is challenging? Is the State then supposed to defend what appears to be attacks on the sufficiency of the findings of fact?

The State respectfully requests if the Court wishes the State to address the sufficiency of specific findings it believes Jackson has actually assigned error to, it allow the State to do so in a supplemental brief. The State should not be forced to guess which findings Jackson is assigning error to.

3. The Trial Court Abused Its Discretion When It Denied Jackson’s CrR 7.8 Motion Using A Manifest Injustice Legal Standard.

After a defendant enters a guilty plea in the trial court, he or she may motion the court to be allowed to withdraw the guilty plea or correct an erroneous sentence. See CrR 4.2(f), CrR 7.8(b). CrR 7.8 allows for relief from final judgment when a defendant provides sufficient proof of:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 7.5;
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void; or

(5) Any other reason justifying relief from the operation of the judgment.

CrR 7.8(b).

In Jackson's case he requested, in a written CrR 7.8 motion, that the trial court resentence him due to an alleged miscalculation of his offender score. CP 57-63.⁵ Jackson argued pursuant to CrR 7.8(b)(5) he was entitled to specific performance to be resentenced with a correct offender score. *Id.* Jackson argued his California crimes were the same criminal conduct and should only be one point. *Id.* Jackson argued his trial attorney, Don Blair, was ineffective for allowing Jackson to stipulate to an offender score that was in excesses of the punishment allowed by law. *Id.* Jackson did not argue in his written motion that his California convictions were not factually comparable to Residential Burglary in Washington or that they did not exist. *Id.*

Jackson pleaded guilty to the charges in this case. CP 28-36. As part of that guilty plea, Jackson initialed next to the portion that included number 6 on the plea form, which sets out the standard

⁵ The other Motion for Relief from Judgment Jackson filed were the claims his attorney waived and said they were not going to pursue.

range for each count Jackson was pleading guilty to. CP 29. All four counts Jackson pleaded guilty to had the offender score filled out on the plea form as “9+” and then the standard ranges for the various crimes. CP 29. The plea of guilty was entered on July 18, 2014. CP 28.

At the plea hearing the deputy prosecutor noted Jackson had out of state criminal history from California which was still being obtained, everyone was in agreement that Jackson was going to have nine points regardless of what happened with the California offenses, but, if for some reason it was less, the State’s recommendation would be high end of the standard range. RP (7/8/14) 2. Jackson’s attorney agreed, noting Jackson had a lot of burglaries when he was very young. *Id.* at 2-3. Jackson also answered, “Yes” when asked if he understood the State’s calculation of his offender score was nine plus and the deputy prosecutor was in the process of verifying that. *Id.* at 11-12.

Jackson signed a document titled, “Stipulation on Prior Record And Offender Score” on July 24, 2014, prior to the formal entry of his judgment and sentence. RP (7/24/14) 2-3. CP 37-38. The Stipulation states:

Upon the entry of a plea of guilty in the above cause number, the defendant hereby agrees and stipulates

that the following represents the defendant's complete FELONY CRIMINAL HISTORY for offender score purposes, and the information in this Stipulation on Prior Record and Offender Score is correct, and furthermore that the defendant is the person named in the conviction. The defendant stipulates that the following convictions are Washington State convictions or out of State convictions equivalent to Washington State felony convictions of the class indicated per RCW 9.94A.360(3) (Classifications of felony/misdemeanor, Class, and Type made under Washington Law):

CP 37. The Stipulation lists the following convictions also states that Jackson agrees none of his convictions listed have washed out. CP 38.

The criminal history was listed as follows:

	<i>Crime</i>	<i>Date of Crime</i>	<i>Date Of Sentence</i>	<i>Sentencing Court (County & State)</i>	<i>A or J Adult, Juv.</i>	<i>Type of Crime</i>
1	Residential Burglary	02-03-97	03-17-97	San Diego Co. California	A	NV
2	Residential Burglary		06-24-96	San Diego Co. California	A	NV
3	Residential Burglary		06-24-96	San Diego Co. California	A	NV
4	Residential Burglary		06-24-96	San Diego Co. California	A	NV
5	Residential Burglary		06-24-96	San Diego Co. California	A	NV
6	Theft Of A Firearm		06-24-96	San Diego Co. California	A	NV

7	Theft Of A Firearm		06-24-96	San Diego Co. California	A	NV
8	Ulawful Taking Of A Motor Vehicle		02-22-11	Los Angeles, California	A	NV

CP 37-38.⁶ Also included in the stipulation of the offender score is explicit language if the State has reduced the charges as part of a plea agreement and the defendant files a motion to set aside the plea of guilty the State may refile the dismissed or reduced charges. CP 38. If the defendant received a sentence within the standard range, he is also waiving his right to collaterally attack his criminal history and offender score. CP 38. Jackson signed the Stipulation, as did his attorney, and the deputy prosecuting attorney. CP 38.

The trial court ruled that Jackson had the burden at the hearing to show under CrR 7.8(b)(5) that he suffered a manifest injustice that warrants resentencing. MRP 100-01; CP 316-17. The trial court ruled Jackson had failed to demonstrate there was a manifest injustice. *Id.* The trial court stated, “I’m going to deny the motion under rule 7.8, Criminal Rule 7.8. There is not manifest

⁶ The State deleted the final column which is titled “DV* Yes” as none of Jackson’s crimes had this notation and it was impossible to make this table fit the page in a readable format with the last column.

injustice here.” MRP 100. Later, the trial court again states, “... I don’t think there is a manifest injustice here.” MRP 105.

A manifest injustice is the legal standard used to determine if a defendant should be able to withdraw their guilty plea pursuant to CrR 4.2(f). Manifest injustice has been defined by a list of four, nonexclusive, factors including, “(1) the plea was not ratified by the defendant, (2) the plea was not voluntary; (3) effective counsel was denied; or (4) the plea agreement was not kept.” *State v Zhao*, 157 Wn.2d 188, 197, 137 P.3d 835 (2006). A motion to withdraw guilty plea raised after judgment was entered must also meet the requirements of CrR 7.8. *State v. Lamb*, 175 Wn.2d 121, 128, 285 P.3d 27 (2012).

Jackson has a right to appeal the denial of his CrR 7.8 motion. *State v. Larranaga*, 126 Wn. App. 505, 508, 108 P.3d 833 (2005). Yet, on appeal, the only order before the appellate court is the denial of the CrR 7.8 motion. *Larranaga*, 126 Wn. App. at 509. “The original sentence would not be under consideration.” *Id.* Appellate review is limited to whether the trial court abused its discretion when it denied the CrR 7.8 motion. *Id.*

A post judgment motion must state a legal standard under CrR 7.8 for the determination of a relief from judgment motion. *Lamb*, 175

Wn.2d at 128. In *Lamb* the defendant filed a post judgment motion to withdraw his guilty plea and vacate juvenile convictions. *Id.* at 125. The trial court in *Lamb* granted the order, finding “that ‘under the totality of the facts and circumstances in this case denying the motion to withdraw the plea of guilty and vacate the order of disposition would be fundamentally unfair and constitute a manifest injustice.’” *Id.*

The State appealed and the Supreme Court held the trial court applied the wrong legal standard and therefore abused its discretion. *Id.* at 127-28. The Supreme Court explained that “‘manifest injustice’ does not automatically establish that relief is available under” the catchall provision of CrR 7.8(b)(5). *Id.* at 128. CrR 7.8(b)(5) allows the trial court to grant relief for “[a]ny other reason justifying relief from operation of the judgment,” which includes “where the interest of justice most urgently require it.” *Id.* (internal citation omitted). The Supreme Court found that the trial court used the incorrect legal standard, which, made the trial court’s decision based on untenable reasons and therefore an abuse of discretion. *Id.* at 128-129.

The trial court made the same mistake here as the court did in *Lamb*, it applied the wrong legal standard to a motion for relief from judgment under CrR 7.8. Therefore, the trial court abused its

discretion when it denied the motion on the grounds Jackson had failed to show there was a manifest injustice. This Court should remand Jackson's case back to the trial court to apply the correct legal standard to its determination of Jackson's CrR 7.8 hearing held on January 21, 2016.

B. JACKSON RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE PROCEEDINGS.

Jackson's attorney provided competent and effective legal counsel throughout the course of his representation during the CrR 7.8 hearing. Jackson asserts his counsel for his CrR 7.8 hearing, Mr. Clark, was ineffective for failing to adequately prepare and evaluate Jackson's California convictions.⁷ Brief of Appellant 27-30. Jackson received effective assistance from Mr. Clark and his claim to the contrary fails.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered.

⁷ The State would note that from Jackson's brief (and the CrR 7.8 hearing) it is the State's understanding the ineffective assistance of counsel claim contained in this brief only pertains to Mr. Clark, Jackson's counsel from the CrR 7.8 hearing.

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)
(citations omitted).

2. Jackson's Attorney For His CrR 7.8 Hearing Was Not Ineffective For Failing To Adequately Prepare and Evaluate Jackson's California Convictions.

To prevail on an ineffective assistance of counsel claim Jackson must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant

was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice “requires ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

Jackson argues Mr. Clark did not adequately prepare to represent him at the CrR 7.8 hearing. Jackson appears to base this argument on Mr. Clark not citing to specific cases that appellate counsel believes Mr. Clark should have argued to the trial court in support of Jackson’s argument for the lack of comparability of his California offenses.

Jackson has not met his burden to show his counsel was deficient for failing to adequately prepare and evaluate Jackson’s prior California convictions. Jackson’s own actions during his hearing left him less than credible with the trial court. Jackson first admitted he had the convictions, but argued, as he always had, that they were a crime spree and should be counted as same criminal conduct. MRP 17-19. Later, when cross-examined by the deputy prosecutor about his four counts of Residential Burglary in 1996, Jackson replied, “I don’t recall this ever happening.” MRP 38. Jackson was

insistent that he was not in fact convicted of those crimes, and evaded answering the judge's questions on the issue. MRP 43-44.

Mr. Clark cross-examined Mr. Blair about his review of Jackson's criminal history. MRP 65-66. Mr. Clark questioned why Mr. Blair did not show, or go over more thoroughly, the criminal history printout, with Jackson. MRP 66-67. Mr. Clark questioned Mr. Blair as to why he was not concerned about the lack of detail regarding Jackson's prior California convictions in the judgment and sentence. MRP 67-68. Mr. Clark pointed out to Mr. Blair that there were no victims listed in the complaint for the burglaries committed on May 28, 1996. MRP 68-69. Mr. Clark asked about the guns from May 29, 1996. MRP 69. Mr. Clark asked Mr. Blair how, when on the face of the documents themselves, you cannot tell that these are separate theft and burglaries, did he come up with separate conduct. MRP 70.

Mr. Clark also inquired of Mr. Blair about how they arrived at the points for the current offenses and why they were not scored as same criminal conduct. MRP 72-74.

During his argument to the court, Mr. Clark argued that the information provided by the State was not sufficient to prove Jackson's prior 1996 crimes were not same criminal conduct. MRP 92-94. Mr. Clark cited relevant Washington State case law, pointed

out there was no listed victims of the residential burglaries in California, stated his client's testimony was this was a crime spree, and pointed out they had no facts beyond separate dates to support other criminal conduct. *Id.* Mr. Clark also made an alternative argument, for a lower offender score, regarding the thefts and the burglaries being same criminal conduct at the very least. MRP 94-95.

Mr. Clark made the only arguments he could. On the face of the documents provided by the State, California included unlawfully enter with the intent to commit theft to the charging document, thereby making the Residential Burglaries legally and factually comparable to Washington Residential Burglaries. RCW 9A.52.025; *In re Lavery*, 154 Wn.2d 249, 255-58, 111 P.3d 837 (2005). Therefore, Mr. Clark picked apart Mr. Blair's representation of Jackson and made the only legal arguments he could on behalf of his client.

The Court should find Jackson has not met his burden to show his attorney's representation at the CrR 7.8 hearing to be deficient, and his claim of ineffective assistance of counsel therefore fails.

C. THE TRIAL COURT INQUIRY OF JACKSON REGARDING HIS ABILITY TO PAY WAS SATISFACTORY PRIOR TO ITS IMPOSITION OF NON-MANDATORY LEGAL FINANCIAL OBLIGATIONS.

Jackson argues the trial court imposed discretionary legal financial obligations, the court appointed attorney fees, without considering his financial resources and present or future ability to make payments. This is incorrect. The trial court's consideration was satisfactory given the facts of the case and the inquiry of Jackson. If this Court finds the trial court erred, the correct remedy is to remand this case back to the trial court for the judge to conduct the required inquiry.

In *State v. Blazina* the Washington State Supreme Court determined the Legislature intended that prior to the trial court imposing discretionary legal financial obligations there must be an individualized determination of a defendant's ability to pay. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Supreme Court based its reasoning on its reading of RCW 10.01.160(3), which states,

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

Blazina, 182 Wn.2d at 837-38. Therefore, to comply with *Blazina*, a trial court must engage in an inquiry with a defendant regarding his or her individual financial circumstances. *Id.* The trial court must make an individualized determination about not only the present but future ability of that defendant to pay the requested discretionary legal financial obligations before the trial court imposes them. *Id.* In *State v. Duncan*, the Washington State Supreme Court determined that the imposition and collection of legal financial obligations have constitutional implications and may be challenged for the first time on appeal. *State v. Duncan*, 185 Wn.2d 430, 434-38, 374 P.3d 83 (2016).

The State originally requested and the trial court imposed total legal financial obligations of \$2,446.00. CP 45-46. This included \$800.00 in non-discretionary obligations, the Victim Assessment, Criminal Filing Fee, and DNA fee. CP 45. There was \$1,646 in discretionary fees imposed, for Court Appointed Attorney, Jail Fee, and Sheriff Service Fee. CP 45. There was also a separate order for attorney fees for \$1,608.75. CP 55.

At the time of the original sentencing hearing Jackson made the following statement to the trial court:

I came out here because I wanted to start another life away from the BS in California, you know, and I

diligently looked for work. Got laid off, got other jobs. I felt like I could come out here and get another job. What I do is construction. I'm a tattoo artist. I felt like I come out here, I can bring my son out here... All I want to do is get out and go get another job like I was going to do in the first place. I'm trying to be an active participant in society... Now I'm older and not with that type of lifestyle anymore. I'm trying to get back out from this, pay the little price I've got to pay and start anew and start working like I planned to do. That's my main thing, and I was hoping that the Court will allow me to get back and show that basically that's what I came to do.

RP (7/18/14) 25-27.

At the motion hearing Jackson now stated he was bipolar and unable to keep a job for any period of time. MRP 86. Jackson acknowledged on cross-examination that he was a trained tattoo artist, had been looking for a construction job, and nothing would prevent him from working once released from prison. MRP 88. There was discussion that Jackson was inadvertently double billed attorney fees, which needed to be corrected. MRP 89-90.

The trial court properly ruled Jackson had the ability to make periodic payments on his legal financial obligations and was able to work given Jackson's own statements at his original sentencing hearing. MRP 90-91. Despite this, the trial court struck the \$1,000 jail fee. MRP 90. The trial court also corrected the judgment and sentence to eliminate the double billing of attorney fees by removing

the \$600.00 of attorney fees from the judgment and sentence. MRP 90-91.

The trial court inquiry was sufficient. This Court should affirm the imposition of the legal financial obligations. If this Court does find the inquiry inadequate, it should remand the case back to the trial court to make the proper inquiry.

D. JACKSON'S ISSUE REGARDING APPELLATE COSTS IS MOOT WITH THE COURT'S AMENDMENT OF RAP 14.2 .

Jackson argues this Court should not impose appellate costs if the State prevails. This issue has been mooted by the amendment of RAP 14.2, as Jackson was found indigent for purposes of this appeal, and the State has no evidence that his circumstances have changed. See RAP 14.2; CP 325-26. Given that Jackson is currently incarcerated in the Department of Corrections the State sees no change likely in his financial status. Nor does the State know how it will ever meet RAP 14.2's burden to show by a "preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2 guarantees there will be no appellate costs imposed upon Jackson in this case if the State is the prevailing party.

IV. CONCLUSION

The trial court abused its discretion when it used the wrong legal standard to determine Jackson had not met his burden and denied his CrR 7.8(b) motion based on a manifest injustice standard. Jackson has not met his burden to show that his attorney for his CrR 7.8 hearing was deficient, and his ineffective assistance of counsel claim therefore fails. The trial court made an adequate inquiry regarding Jackson's ability to pay his legal financial obligations. The State cannot recover appellate costs from an indigent appellant pursuant to the amendment of RAP 14.2, absent an impossible showing of a change of circumstance, therefore this issue is moot. The Court should therefore remand Jackson's case back to the trial court for it to apply the correct legal standard to its determination of Jackson's CrR 7.8 hearing that was held on January 21, 2016.

RESPECTFULLY submitted this 27th day of February, 2016.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



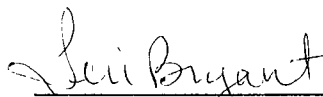
by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON, Respondent, vs. BYRON FAMOUS JACKSON, Appellant.	No. 48661-0-II DECLARATION OF SERVICE
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Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On February 27, 2017, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Kathryn A. Russell Selk, attorney for appellant, at the following email addresses: KARSdroit@aol.com.

DATED this 27th day of February, 2017, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

February 27, 2017 - 3:43 PM

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